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TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1087~~. ~~637~~ ~~293~~ 61

J. CATLETT GIBSON, PLAINTIFF IN ERROR,

vs.

WILLIAM H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED DECEMBER 11, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1890.

1 In the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Pleas before the said court.

Be it remembered that heretofore, to wit, on the 12th day of July, 1887, came the plaintiff, J. Catlett Gibson, and filed his declaration against the defendant, Wm. H. Peters, receiver of the Exchange National Bank of Norfolk; which declaration is in the words and figures following, to wit:

2 In the Circuit Court of the United States for the Eastern District of Virginia.

J. Catlett Gibson complains of William H. Peters, receiver of the late Exchange National Bank of Norfolk, of a plea of trespass on the case in assumpsit, for this, to wit, that heretofore, to wit, on the 13th day of June, A. D. 1885, the said plaintiff was appointed by the President of the United States of America as district attorney of the United States for the eastern district of Virginia, and was confirmed by the Senate of the United States and qualified, and has since said qualification been performing the duties of said office; and the plaintiff further avers that the Exchange National Bank of Norfolk was up to April 2nd, 1885, a national banking association, organized under the national banking law of the United States, and carrying on business as such in the city of Norfolk, Virginia, up to the said April 2nd, 1885, on which day it failed and was closed by order of the Comptroller of the Currency by virtue of the authority vested in him by law, and on the — day of April, A. D. 1885, the said defendant was appointed by the said Comptroller of the Currency as receiver of the said bank, and the said defend-

3 ant, on — day of ——, A. D. 1885, duly qualified as such receiver and has since been acting as such; and the plaintiff further avers that under the laws and statutes of the United States he is the official counsel of the said receiver and is entitled to conduct all legal business pertaining to the winding up of said bank and to reasonable fees and compensation for so doing; and the plaintiff further avers that in the course of winding up said bank it became necessary to bring suit against one R. H. McDonald for a large amount of money, to wit, the sum of $120,000, which was due by the said McDonald as an assessment upon him as a stockholder of said bank, imposed upon him by the Comptroller of the Currency by virtue of the authority vested in the said Comptroller of the Currency by law; and the plaintiff further avers that suit was actually brought against said McDonald by said receiver, the defendant in this cause, in the circuit court of the United States for the eastern district of Virginia, at Norfolk; and the plaintiff further avers that in consequence of said suit the said McDonald paid to the said defendant the said sum of $120,000, with the costs of suit, and the said money was thereby realized by the said defendant and applied to the payment of the debts of the said insolvent bank.

4 And the plaintiff further avers that in said suit he acted as counsel of the said defendant, supervising the conduct of said suit and assisting to secure its successful result; and the plaintiff further avers that he is entitled to a reasonable compensation for his services in that regard, and that a reasonable compensation would be $6,000, or five per cent. on the amount realized; and the plaintiff further avers that the said defendant accepted and profited by his services and undertook and promised to pay for the same; and the plaintiff further avers that by virtue of his position he is entitled to act as counsel for the said defendant, and that the law implies a promise on the part of the said defendant to pay him for his services aforesaid; and the plaintiff further avers that the defendant denies any liability to him, the said plaintiff, in the premises, and denies that by virtue of his, the said plaintiff's, being district attorney of the United States for the eastern district of Virginia he, the said plaintiff, under the laws of the United States, has any claim upon him for compensation for his services aforesaid; and the plaintiff avers that by reason of the premises the defendant became liable to him, the said plaintiff, for the sum of $6,000, above demanded, and, being so liable, undertook and promised to
5 pay him, the said plaintiff, the sum aforesaid; whereupon an action has accrued to the said plaintiff to demand and have of the said defendant the sum aforesaid. Yet the said defendant, not regarding his said promise and undertaking, did not nor would he at any time pay to the said plaintiff the sum aforesaid or any part thereof, but to pay the same has wholly neglected and refused and still does neglect and refuse, to the damage of the plaintiff.

And for this also, to wit, that the defendant, on the 11th day of August, A. D. 1887, was indebted to the plaintiff in the sum of $6,000 for the work, care, diligence, and attendance of the plaintiff by him before that time done, performed, and bestowed as the attorney and counsellor of and for the said defendant in and about the prosecuting, defending, and care of a certain action at law against on- R. H. McDonald in the circuit court of the United States for the eastern district of Virginia, by which a large sum was realized to the said defendant, and for divers journeys and attendances by the plaintiff before that time performed and given for and to the defendant. Yet the said defendant, not regarding his several promises and undertakings, has not as yet paid to the said plaintiff the said several sums of money or any or either of them or any part thereof, al-
6 though often requested so to do, but to pay the same has wholly neglected and refused and still does neglect and refuse, to the damage of the said plaintiff of $10,000, and therefore he brings his suit.

LEGH R. PAGE.
SHARP & HUGHES.

Sworn to before me this 12th day of July, A. D. 1887, by J. Catlett Gibson.

A. R. HANCKEL,
Dp. Clerk U. S. Dist. Court, E. D. of Va.

Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, Va., in account with J. Catlett Gibson.

1885.

August 11th. To fee in case of W. H. Peters, receiver, *vs.* R. H. McDonald, 5 per cent. of ---------- $120,000
Amount realized---------- 6,000

7 And at another day, to wit, on the 3rd day of October, 1887, came the defendant and offered his plea; which said plea is in the words and figures following, to wit:

8 In the Circuit Court of the United States for the Eastern District of Virginia.

J. CATLETT GIBSON, Plaintiff,
vs.
WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Defendant.

The defendant comes and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained; and of this the said defendant puts himself upon the country.

WM. H. PETERS,
Receiver of the Exchange National Bank of Norfolk.

T. S. GARNETT,
Attorney for Defendant.

CITY OF NORFOLK,
Eastern District of Virginia.

This day personally appeared before me William H. Peters, receiver, &c., and made oath that the above plea is true in point of fact, and that he is advised by his counsel to file said plea.

Given under my hand this 3rd day of Oct., 1887.

A. R. HANCKEL,
Dp. Clerk U. S. Dist. Court, E. D. of Va.

I hereby certify that I advised the defendant to file the above plea.

T. S. GARNETT,
Att'y for Defendant.

9 To said plea the plaintiff replied generally; and at another day, to wit, on the 18th day of July, A. D. 1888, the following judgment was entered:

10 In the Circuit Court of the United States for the Eastern District of Virginia.

J. C. GIBSON
vs.
WM. H. PETERS, Receiver, &c.

The parties to this cause having by their written stipulation waived a trial by jury and submitted the whole matter of law and fact to the judgment of the court, it is considered by the court that the plaintiff do recover of the defendant, Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, from the assets of said bank in his hands the sum of three thousand dollars ($3,000), with costs and interest.

RO. W. HUGHES, *Judge.*

Norfolk, 18th July, 1888.

11 And thereupon the defendant moved the court for a new trial, and also for a stay of entry of any judgment or decree in the cause, upon which said motions the following orders were entered:

12 In the Circuit Court of the United States for the Eastern District of Virginia.

In the Matter of the Petition of J. C. GIBSON, U. S. Attorney,
vs.
WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk.

In this cause the defendant, Wm. H. Peters, receiver, by his counsel, this day entered his petition for a stay of entry of any judgment or decree upon the decision filed on the 2nd day of July, 1888, and moved the court accordingly, which motion the court doth overrule; and thereupon the said defendant asked leave to file his petition for a rehearing of this cause on the grounds set forth in his said petition, and moved the court for a rehearing in the cause, which motion the court doth overrule; to which several rulings of the court the defendant excepts.

RO. W. HUGHES, *Judge.*

Norfolk, 18th July, 1888.

13 In the U. S. Circuit Court for the Eastern District of Virginia.

J. C. GIBSON, U. S. Attorney,
vs.
WM. H. PETERS, Receiver, &c. } In Assumpsit.

This day came the defendant, by his counsel, and moved the court for a new trial, on the ground that the judgment herein this day entered against him is contrary to law and the evidence; which

motion for a new trial the court doth overrule, and defendant excepts.

RO. W. HUGHES, *Judge.*

Norfolk, 18th July, 1888.

14 And afterwards, to wit, on the 30th day of October, A. D. 1888, the following order was entered:

15 In the Circuit Court of the United States for the Eastern District of Virginia.

J. C. GIBSON, Plaintiff,
vs.
WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk, Defendant. } In Assumpsit.

In this action, wherein argument was fully heard by the circuit judge and the district judge, together sitting and holding the said circuit court, the parties hereto having, by their written stipulation filed herein, waived a trial by jury and submitted the whole matter of law and fact to the judgement of the court, on the tenth day of January, 1888, and the court having taken time to consider of its judgment, it appearing now to the court that an opinion in writing by the district judge was filed herein on the 2nd day of July, 1888, and in accordance therewith the district judge directed a judgment for the plaintiff to be entered by the clerk of this court, and that such judgment was so entered of record by the clerk on the 18th day of July, 1888, without the concurrence of the circuit judge in the said opinion or in the *the* judgment so entered thereon, *it* which said opinion and judgment the circuit judge does not concur, it is ordered by the court that the said judgment so entered for the plaintiff on the 18th day of July, 1888, as aforesaid be, and the same is hereby, set aside.

16 And the court, upon request of counsel for the plaintiff asking the benefit of a certificate of division of opinion, doth continue this cause for the entry of final judgment for the defendant until the next term of this court.

Oct. 30th, 1888.

HUGH L. BOND, *Cr. Judge.*

And afterwards, to wit, on the 18th day of January, A. D. 1889, final judgment for the *the* defendant was ordered to be entered by the Hon. Hugh L. Bond, cr. judge, which was accordingly done, and thereupon the following certificate of division of opinion was filed:

17 At a circuit court of the United States for the eastern district of Virginia, held at the city of Norfolk, in said district, on this 18th day of January, 1889.

Present: Hon. Hugh L. Bond, circuit judge; Hon. Robert W. Hughes, district judge.

J. C. GIBSON, U. S. Attorney,
vs.
WM. H. PETERS, Receiver of the Exchange National Bank of Norfolk. } In Assumpsit.

This is an action of assumpsit brought by J. C. Gibson, the United States attorney for the eastern district of Virginia, plaintiff, against Wm. H. Peters, receiver of the Exchange National Bank of Norfolk, a national bank in process of involuntary liquidation under the provisions of the national banking act, for services alleged to have been rendered or offered to be rendered by the plaintiff to the said receiver by virtue of his office as United States district attorney in a certain civil suit brought by said receiver against one R. H. McDonald at the July rules, 1885, which suit was dismissed by the said receiver at the August rules, 1885, of this court, having been settled out of court by the said receiver. The claim of the plaintiff here is for six thousand dollars as extra compensation for his alleged services so offered by him to be rendered in said suit and refused by the receiver. The plaintiff's declaration is in the
18 words and figures following, to wit:

In the Circuit Court of the United States for the Eastern District of Virginia.

J. Catlett Gibson complains of William H. Peters, receiver of the late Exchange National Bank of Norfolk, Virginia, of a plea of trespass on the case in assumpsit, for this, to wit, that heretofore, to wit, on the — day of ——, A. D. 188–, the said plaintiff was appointed by the President of the United States of America as district attorney of the United States for the eastern district of Virginia and was confirmed by the Senate of the United States and qualified, and has since his qualification been performing the duties of said office.

And the plaintiff further avers that the Exchange National Bank of Norfolk, Virginia, was, up to April 2nd, 1885, a national banking association, organized under the national banking law of the United States, and carrying on business as such in the city of Norfolk, Virginia, up to the said April 2nd, 1885, on which day it failed and was closed by order of the Comptroller of the Currency by virtue of the authority vested in him by law; and on the — day of April, A. D. 1885, the said defendant was appointed by the said Comptroller of the Currency as receiver of the said bank, and the said defendant, on the — day of ——, A. D. 1885, duly qualified as such receiver and has since then been acting as such.

19 And the plaintiff further avers that under the laws and statutes of the United States he is the official counsel of the said receiver and is entitled to conduct all legal business pertaining to the winding up of said bank and to reasonable fees and compensation for so doing; and the plaintiff further avers that in the course of winding up said bank it became necessary to bring suit against one R. H. McDonald for a large amount of money, to wit, for the

sum of $120,000, which was due by the said McDonald as an assessment upon him as a stockholder of said bank, imposed upon him by the Comptroller of the Currency by virtue of the authority imposed in the said Comptroller of the Currency by law; and the plaintiff further avers that suit was actually brought against said McDonald by said receiver, the defendant in this cause, in the circuit court of the United States for the eastern district of Virginia, at Norfolk; and the plaintiff further avers that in consequence of said suit the said McDonald paid to the said defendant the sum of $120,000, with the costs of suit, and the said money was thereby realized by the said defendant and applied to the payment of the debts of the said insolvent bank.

20 And the plaintiff further avers that in said suit he acted as counsel of the said defendant, supervising the conduct of said suit and assisting to secure its successful result; and the plaintiff further avers that he is entitled to a reasonable compensation for his services in that regard, and that a reasonable compensation would be $6,000, or five per cent. on the amount realized; and the plaintiff further avers that the said defendant accepted and profited by his services and undertook and promised to pay for the same; and the plaintiff further avers that by virture of his position he is entitled to act as counsel for the said defendant, and that the law implies a promis- on the part of the said defendant to pay him for his services aforesaid; and the plaintiff further avers that the defendant denies any liability to him, the said plaintiff, in the premises and denies that by virture of his, the said plaintiff's, being district attorney of the United States for the eastern district of Virginia he, the said plaintiff, under the laws of the United States has any claim upon him for compensation for his services aforesaid; and the plaintiff avers that by reason of the premises the defendant became liable to him, the said plaintiff, for the sum of $6,000 above demanded, and being so liable undertook and promised to pay him, the said plaintiff, the sum aforesaid. Whereupon an action has accrued to the said plaintiff to demand and have of the said defendant the sum aforesaid. Yet the said defendant, not regarding the said promise and undertaking, did not nor would he at any time pay to the said plaintiff the sum aforesaid or any part thereof, but

21 to pay the same has wholly neglected and refused and still does neglect and refuse, to the damage of the plaintiff $10,000, and therefore he brings his suit.

(Signed) LEIGH R. PAGE, } P. Q.
" SHARP & HUGHES, }

Sworn to before me this 12th day of July, A. D. 1887, by J. Catlett Gibson.

(Signed) A. R. HANCKLE,
D'p'ty Clerk U. S. Dist. Court, E. D. of Va.

22 To which declaration the defendant pleaded issue *non-assumpsit.*

And the whole matter of law and fact being by the written

stipulation of the parties submitted to the court at the hearing on January 10th, 1888, waiving a jury, the plaintiff introduced evidence as to the extent and value of his services rendered or offered to be rendered as such U. S. attorney, and the defendant introduced evidence to the contrary thereof, that the plaintiff had not rendered such services, and that the said receiver did not request any services from the plaintiff in said action, and that other counsel had been employed therein by said receiver by direction of the Comptroller of the Currency of the United States, and that plaintiff had not presented his claim to the Treasury Department, nor had it been allowed by the Comptroller of the Currency, nor had the plaintiff received any direction from the solicitor of the Treasury to render such alledged services.

And the court, having fully heard argument of counsel in the cause, took time to consider of its opinion and judgment in said action, and the cause was continued.

And now, at this term, *of* the court this day entered judgment accordingly for the defendant, and thereupon, on the request of counsel for the plaintiff, the following questions are stated, upon which the said judges are divided in opinion:

1st. Wheather the United States district attorney is entitled by virture of his office to appear and act as counsel for the receiver
23 of a national bank in collecting its assets and winding up its affairs without the request of counsel of said receiver and without the direction of the solicitor of the Treasury.

2d. Wheather, conceding his rights so to appear and he does so appear of his own motion, is he entitled to any extra compensation beyond that prescribed by law for his official services.

3d. Wheather, conceding his right so to appear and act, he is entitled to any extra compensation beyond that provided by law for his official services except such as the Comptroller of the Currency may allow after his claim therefor has been presented to the Treasury Department, according to the provisions of section 299 of the Revised Statutes.

4th. Wheather the U. S. district attorn-y, whose official service had been tendered to such receiver and declined by him for the reason that he had employed other counsel acting under the direction of the Comptroller of the Currency and solicitor of the Treasury, is entitled to extra compensation for such offer of services, wheather the service was rendered by the district attorn-y or not.

5th. Wheather, conceding his right so to receive extra compensation when he has offered to appear and act as official counsel without the request or consent of the receiver, is such compensation payable out of the assets of the bank in the hands of the receiver or out of the funds provided by law for the payment of district attorneys for their official services.

24 Upon which said questions, the opinions — judges being opposed and the opinion of the presiding judge being adverse to the plaintiff, final judgment was rendered for the defendant.

Whereupon the plaintiff, by counsel, moved that the questions

above set fourth be certified under the direction of the judges to the supreme court along with the record, which is accordingly done in open court at this term, and writ of error from said judgment is now allowed to said plaintiff and bond fixed therefor, to operate as supersedeas, in the sum of two hundred and fifty ($250) dollars.

Done and certified this 18th day of January, A. D. 1889, in open court.

(Signed) HUGH L. BOND, *Cir. Judge.*
" RO. W. HUGHES, *Dis. Judge.*

And thereupon, to wit, on the said 18th day of January, 1889, in open court a writ of error was allowed the said plaintiff, and bond in the sum of two hundred and fifty ($250.00) dollars was required of the said plaintiff, to operate as a supersedeas; whereupon the following bond was given by the plaintiff and approved by the judge:

25 In the Circuit Court of the United States for the Eastern District of Virginia.

J. C. GIBSON
vs.
WM. H. PETERS, Receiver.

Know all men by these presents that we, J. C. Gibson, as principal, and C. Billups, as surety, are held and firmly bound unto Wm. H. Peters, receiver, in the sum of two hundred and fifty ($250) dollars, lawful money of the United States, to be paid to the said Wm. H. Peters, his heirs and administrators. Witness our hands and seals this 18th day of January, A. D. 1889.

The condition of the above obligation is such that whereas the said J. C. Gibson has sued out a writ of error in the above-entitled cause: Now, if the said J. C. Gibson shall prosecute said writ of error to effect, and if he fail to make his plea good shall answer all damages and costs, then this obligation to be void; otherwise to remain in full force and virtue.

J. C. GIBSON. [SEAL.]
C. BILLUPS. [SEAL.]

Acknowledged before me in open court, and bond approved.
HUGH L. BOND,
Circuit Judge.

A true transcript of the record in the foregoing cause.

{ Seal United States Circuit Court, Eastern District of Virginia, Norfolk. }

Teste:

MATTHEW F. PLEASANTS, *Clerk,*
By CHARLES T. BARRY, *Dp. Cl'k.*

Cost of record, 15.00.
Teste:
C. T. BARRY, *Dp. Clerk.*

26 In the Circuit Court of the United States for the Eastern District of Virginia.

J. C. GIBSON
vs.
WILLIAM H. PETERS, Receiver of the Exchange National Bank of Norfolk.

In this cause, which was continued from the last term by an order entered herein on the 30th day of October, 1888, for the entry of judgment for the defendant at this term, it is considered by the court that the plaintiff take nothing by his writ, and that the defendant go thereof without day.

HUGH L. BOND, *Cr. Judge.*

Jan'y 18th, 1889.

A true copy of the original judgment filed at this office on January 18th, 1889.

{ Seal United States Circuit Court, Eastern District of Virginia, Norfolk. }

Attest:

M. F. PLEASANTS,
Clerk U. S. Cr. C't,
Per CHAS. T. BARRY, *Dp. Clerk.*

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between J. Catlett Gibson, plaintiff, and William H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 18th day of January, in the year of our Lord one thousand eight hundred and eighty —, '89.

{Seal United States Circuit Court, Eastern District of Virginia, Norfolk.}

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States,
Per CHAS. T. BARRY, *Dp. Clerk.*

Allowed by—
HON. HUGH L. BOND,
U. S. Cr. Judge.

Endorsed on cover: E. Virginia C. C. U. S. No 1087. J. Catlett Gibson, plaintiff in error, *vs.* William H. Peters, receiver of the Exchange National Bank of Norfolk, Virginia. Filed December 11, 1889.

FILED.
APR 7 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 293.

J. CATLETT GIBSON, PLAINTIFF IN ERROR,

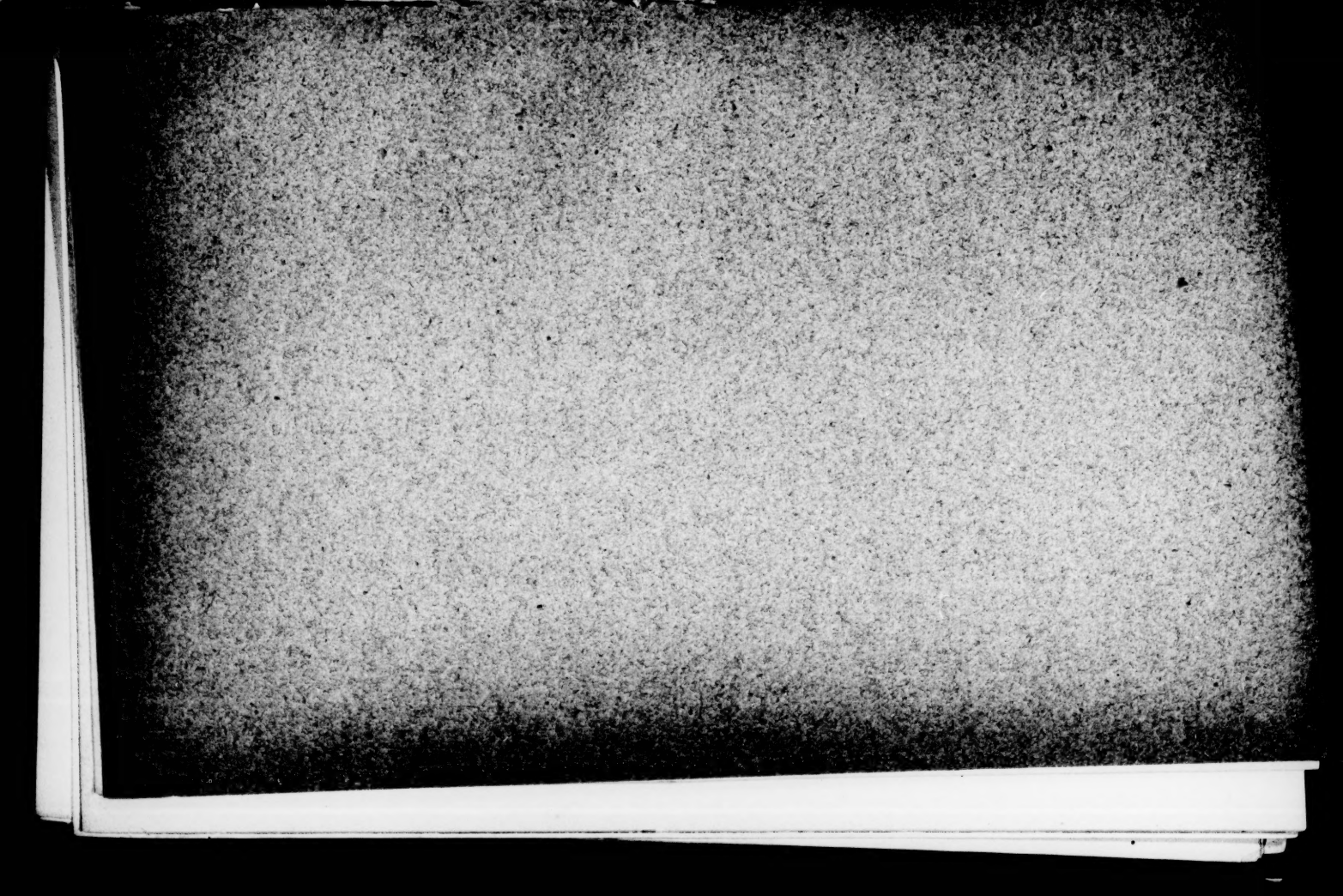
vs.

WILLIAM H. PETERS, RECEIVER OF THE EXCHANGE NATIONAL BANK OF NORFOLK, VIRGINIA.

BRIEF FOR THE PLAINTIFF IN ERROR.

ROBERT M. HUGHES,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 293.

J. CATLETT GIBSON, PLAINTIFF IN ERROR,

vs.

WM. H. PETERS, RECEIVER, &c.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Brief for Plaintiff in Error.

STATEMENT.

This is a suit by the plaintiff against the receiver of the late Exchange National Bank of Norfolk, Virginia, to recover a fee for legal services which he rendered, or which he was entitled to render, in the case of Peters, receiver, *vs.* McDonald. The plaintiff claims that it was his right as United States attorney for the eastern district of Virginia to act as counsel for the receiver. The receiver denies that right and claims the right to employ private counsel;

ignores the United States attorney, and contends that if he is entitled to any fee, exclusive of his salary, it must be paid out of the Federal Treasury and be subject to the action of the accounting offices of the Government.

The suit in which this question arises is an ordinary action of assumpsit, to which the defendant plead the general issue. The case was argued before Circuit Judge Bond and District Judge Hughes in January, 1888. Not having been decided in July, 1888, and Circuit Judge Bond having meanwhile gone to Europe, District Judge Hughes on July 18, 1888, on the plaintiff's motion, gave him a judgment. The term of the court expired early in November, 1888. On October 30, 1888, Circuit Judge Bond, having in the meanwhile returned, set aside this judgment. On January 18, 1889, he entered judgment for defendant and there were certified up by the two judges the following questions on which they were divided in opinion:

(1.) Whether the United States district attorney is entitled by virtue of his office to appear and act as counsel for the receiver of a national bank in collecting its assets and winding up its affairs without the request of counsel of said receiver and without the direction of the solicitor of the Treasury.

(2.) Whether, conceding his right so to appear, and he does so appear of his own motion, he is entitled to any extra compensation beyond that prescribed by law for his official services.

(3.) Whether, conceding his right so to appear and act, he is entitled to any extra compensation beyond that provided by law for his official services, except such as the Comptroller of the Currency may allow, after his claim therefor has been presented to the Treasury Department according to the provisions of section 299, Revised Statutes.

(4.) Whether the United States district attorney, whose official service had been tendered to such receiver and declined by him for the reason that he had employed other counsel, acting under the direction of the Comptroller of the Currency and solicitor of the Treasury, is entitled to extra compensation for such offer of services, whether the service was rendered by the district attorney or not.

(5.) Whether, conceding his right so to receive extra compensation when he has offered to appear and act as official counsel, without the request or consent of the receiver, is such compensation payable out of the assets of the bank in the hands of the receiver or out of the funds provided by law for the payment of district attorneys for their official services.

These facts appear from the printed record and also from the report of the case in 35 Fed. Rep., 721, and 36 Fed. Rep., 487.

The amount claimed by the plaintiff in his declaration was $6,000.

The plaintiff assigns as error the action of the court in entering judgment for defendant and in deciding adversely to his right to recover the questions of law involved in the foregoing questions.

FIRST AND FIFTH QUESTIONS.

It will be most convenient to discuss the first and fifth questions together, as discussion of the one necessarily involves discussion of the other. These two questions really involve the pith of the case, and may be stated for discussion in the following form:

Has the district attorney the official right to conduct the litigation of broken national banks in his district; and, if so, is he to be paid out of the funds of those banks?

The plaintiff claims the right to act as counsel for the receiver by virtue of section 380 U. S. Rev. Stats., which reads as follows:

"All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States, or any of its officers or agents, shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the solicitor of the Treasury."

Under this section it has been frequently decided that the receiver is an agent of the United States, and that the U. S. attorney is his proper counsel. See—

Frelinghuysen *vs.* Baldwin, 12 Fed. Rep., 396.
Price *vs.* Abbott, 17 Fed. Rep., 506.
Hendee *vs.* R. R. Co., 26 Fed. Rep., 677.
Kennedy *vs.* Gibson, 8 Wall., 504.
Bank *vs.* Bank, 14 Wall., 400.

But, though he is an agent of the United States in the sense that he is appointed by them and assists in the administration of their banking system, he is not an agent in the sense that he has the right to subject them to any peculiar liability. In Case *vs.* Terrell (11 Wall., 199), where the receiver of a broken national bank and his superior, the Comptroller, had attempted to subject the United States to the jurisdiction of a Louisiana Federal court in a matter connected with the national bank and a judgment had been rendered against them, this Court, characterizing the proceeding in the sternest language, said:

"He represents the bank, its stockholders, its creditors, and does not in any sense represent the Government" (p. 202).

And again:

"The United States cannot be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy" (p. 203).

It does not, therefore, follow from the fact that he is an agent of the United States that he has the right to bind them in any way for fees of counsel or otherwise or that the counsel whom he employs or should employ must look to the United States for his pay. The receiver is himself paid from the funds of the bank, not by the Government, and the same is the case with all the other expenses of winding up the bank, including counsel fees.

Section 5238 Rev. Stats.

In the case of Richmond *vs.* Irons (121 U. S., 27), which was the case of a national bank being wound up under a receiver appointed by a chancery court, it was decided that in such a case the expenses of the receivership could not be charged on the fund, distinguishing it from the case of a receiver appointed by the Comptroller, in which latter case the court said it could be charged against the fund. See the last two pages of the opinion. The plaintiff, therefore, while claiming the right to represent the receiver, does not contend that his remuneration comes from the Treasury, but, on the contrary, insists that it should be paid by the receiver himself, who, of course, has the right to charge it against the fund. In this he considers himself sustained by the plain language of section 825 Rev. Stats., which says:

"But nothing herein shall be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with the general usage in their respective States or may be agreed upon by the parties."

But the defendant contended below that the words "attorneys, solicitors, and proctors" did not include the district attorneys, because they are not named *eo nomine* there, although they are in the first part of the section.

If this construction of the statute were a correct one, why

were the words "other than the Government" added? These words would be useless unless district attorneys are also included. After all the district attorney is nothing but an attorney. In these bank cases, although his right to act for the receiver springs from the fact that he is district attorney, yet when he does act he acts simply as an attorney.

Not only this, but the very next section, 824, which has to it the caption, "attorneys, solicitors, and proctors," contains several provisions relative to the fees of the district attorney, showing that the draftsmen of the act included the district attorney as one of the class of "attorneys, solicitors, and proctors."

This construction is evidently the opinion of the Court in U. S. *vs.* Cigars, 2 Fed. Rep., 494. This case also sustains the view taken by the plaintiff throughout the case—that the fees of his office, which must run the gauntlet of the bureaus, are only those payable by the Government out of the public moneys, not those which accrue to him for the services rendered to clients other than the Government.

Section 380 therefore, in conjunction with section 823, gives the plaintiff the right to represent the receiver and to demand a fee out of the trust unless the words of section 380, "under the direction and supervision of the solicitor of the Treasury," mean that he cannot appear at all without previous instructions to do so. Accordingly the defendant in this case took the position that "under the direction" means "after being previously directed to do so." Is he right in this contention? Independent of all other considerations such a construction of the statute would be most extraordinary, as it would give the solicitor of the Treasury the arbitrary power by mere non-action to make the statute inoperative in all the various cases to which it applies.

As Randolph said in reference to the provision for amendments in the State constitution of 1829, such a construction would make the statute "bear its death warrant on its face."

Such a qualification would make the qualification more important than the body of the statute.

Not only this, but it is not the natural meaning of the words used. If the draftsman of the statute had wished it to mean what the defendant contends that it means he would have said "at the direction" or "by the direction" or "when directed."

Not only this, but the context shows what it means. The language is "under the direction and supervision."

Under the rule of *noscïtur a sociis* it means something in the nature of supervision.

It means that the district attorney has, by virtue of the statute itself, independent of the leave of any bureaucrat, the right to appear for the receiver; but that, when he does so appear, then, in the conduct of the business, he is under the general direction and supervision of the solicitor of the Treasury. In other words, the latter is a sort of senior consulting counsel. The power to supervise and direct on his part as to the manner of the business does not give him the autocratic power to ignore or supersede.

Plain as this is in view of all the circumstances, we are not left without guidance in the meaning of these words as construed by the courts. Section 5234 of the Revised Statutes provides that the receiver of a defunct national bank shall, "under the direction of the Comptroller of the Currency, take possession of the books, etc., of the association, collect all debts, claims, and dues belonging to such associations," etc. Under this section a receiver sued a debtor of one of these banks, who, placing upon the words "under the direction" the same meaning which the defendant did in this case, contended that the receiver could not sue for a debt unless directed so to do by the Comptroller; but this Court decided (Bank *vs.* Kennedy, 17 Wall., 19) that the words bore no such meaning; that they simply meant that the receiver should be subject to the direction of the Comptroller:

"It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts, no special action is needed; no unusual exercise of judgment is required. They are to be collected, of course. That is what the receiver is appointed to do."

May we not say the same thing as to section 380, and the district attorney "*mutatis mutandis*"?

May we not safely conclude, therefore, that section 380 vests in the district attorney the right to manage these bank cases independent of anybody's consent, and merely vests in the solicitor of the Treasury a supervisory power over him—a power to advise, not to discharge.

In view of this denial of the right of the plaintiff to appear at all, may we not retort by demanding the warrant for the right of the Comptroller to employ special counsel?

Where does he get that authority? No statute authorizes it. The only department of the Government which can employ special counsel as assistants to the district attorneys of the several districts is the Department of Justice.

The very statutes which give it that power positively forbid the exercise of such a power by any one else. (See sections 363–366, inclusive, of the Revised Statutes.) The excuse for the exercise of such a power by the Comptroller has been a sentence in the case of Kennedy *vs.* Gibson (8 Wall., 498). This was a suit against some stockholders of a national bank to enforce their stock liability. It was brought by private counsel with the approval of the Treasury Department, and presumably with the approval of the Attorney General, as the report of the case does not show to the contrary.

These private counsel were appointed "under the particular circumstances of the case." What those circumstances were the report does not show. For all we know, the district attorney may have been interested in such a way as to

render it proper that he should not appear. At all events, he does not seem to have objected, and the bill was not signed by him. The defendant set this up as a defense, and the question came up in that way. The court merely decided (p. 504) that "the question which arises is between the United States and its officers. The rights of the defendants are in nowise concerned and they cannot be heard to to make the objection that this duty of the local law officer of the Government has devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law."

This case therefore merely decides that the question as to who shall conduct these suits cannot be raised by the defendant in a collateral proceeding; that it is a "question between the United States and its officers." But in the case at bar it arises directly, and when so raised by a party directly interested in its proper decision (and not by parties who owe the debt, no matter what lawyer may bring the suit against them), the court must decide that the Comptroller has no such power. However sad it may be to take from him the only patronage of his office, *ita lex scripta est.* The mere fact that he has been exercising that power by sufferance does not legalize it. Not only he, but the receiver himself, in a suit properly brought, might perhaps be held personally responsible for every dollar which they pay to private counsel; for there is no warrant of law for the proceeding.

They not only cannot ignore the district attorney, cannot set up their judgment as to who is the best counsel against the solemn judgment of the President, evidenced by the selection of one whom he deems best for that office, but they cannot put a creature of their own into his place. The language of sections 363–365 puts all argument on this point out of the question:

SECTION 363. "The Attorney General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings."

SECTIONS 664–'5. "No compensation shall hereafter be allowed to any person, beside the respective district attorneys for services as an attorney or counsellor to the United States, or to any branch or department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney General that such services were actually rendered, and that the same could not be performed by the Attorney General or the solicitor general, or the officers of the Department of Justice, or by the district attorneys."

It would, therefore, seem clear that the first and fifth questions should be answered in favor of the right of the district attorney to represent the receiver and to be paid out of the funds of the trust.

SECOND QUESTION.

Assuming his right to appear and his appearance, is he entitled to any extra compensation beyond that prescribed by law for his official services?

This question is really merely another form of the fifth question, and therefore the above discussion applies equally to it.

The defendant contended that under sections 1764–1765 the plaintiff could recover no extra compensation even if he has the right to appear.

Section 1764 is as follows:

"No allowance or compensation shall be made to any officer or clerk by reason of the discharge of duties which belong to any other officer or clerk in the same, or any other

department, and no allowance or compensation shall be made for any extra services, whatever, which any officer or clerk may be required to perform, unless expressly authorized by law."

Section 1765 is as follows:

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments, are fixed by law, or regulations shall receive any additional pay, extra allowance or compensation in any form whatever for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law and the appropriation therefor, explicitly states that it is for such additional pay, extra allowance or compensation."

These sections so obviously refer to services rendered by officers of the United States to the United States that it would not be deemed necessary to even notice them but for the fact that they were quoted in the lower court by the then solicitor general and urged with apparent gravity.

But it was urged that the district attorney, even if he has the right to conduct this litigation, is limited to his salary, and section 770 of the Revised Statutes is cited in support of this contention.

Section 770 is as follows:

"The district attorney for the southern district of New York is entitled to receive quarterly for all his services a salary at the rate of $6,000 a year. For extra services the district attorney for the district of California is entitled to receive a salary at the rate of $500 a year and the district attorney for all other districts at the rate of $200 a year."

This section is to be construed *in pari materia* with the other sections of the Revised Statutes. It must be construed in conjunction with its neighbors in the same chapter and in conjunction with sections 299 and 825. Thus construed, it evidently refers only to services rendered to the United States or to the cases mentioned in section 299.

It does not refer to services rendered to clients other than the Government.

In U. S. *vs.* Hill, 120 U. S., 169, these various statutes relative to compensation came before this Court.

In that case a clerk was claiming certain fees for naturalization services rendered by him as clerk, for which no special provision was made by the fee bill and which made his income exceed the statutory limit of $3,500. The Government contended that these fees should be included in his return and the excess over $3,500 turned over to it; but this Court decided that it was not necessary to include them in his account, and that he was entitled to them, even though they did exceed $3,500. The fees were for services rendered to private parties and were not under the purview of the bureaux.

THIRD QUESTION.

Assuming plaintiff's right to appear and act and to claim extra compensation, must such compensation be presented to the Treasury Department according to the provisions of section 299 of the Revised Statutes?

Section 299 is as follows:

"All accounts of the United States district attorneys for services rendered, in cases instituted in the courts of the United States, or of any State in which the United States is interested, but is not a party of record, or in cases instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted, or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees as near as may be, to those provided by law for similar services in cases in which the United States is a party."

This section is clearly not applicable. The plaintiff is suing for services rendered or entitled to be rendered in a

case in which the receiver was a party plaintiff. The United States had no interest in such a suit.

It was seriously argued by the defendant below that the United States was interested, first, because it is interested in the proper administration of its laws and, second, because it is specially interested in the national banking system.

If that is the meaning of the word "interest," then the United States have an interest in every case arising under any of its laws and could intermeddle in every lawsuit between private litigants. Their interests would be affected every time the court should remove or remand a cause, every time a Federal question should happen to arise. It would be interested in each one of the thousand suits which the thousand national banks may bring against their debtors.

This cannot be the meaning of the statute. The word "interest" is a legal term and has a legal meaning. When at common law a witness was disqualified on account of interest we know what that meant. There is no reason to suppose that the word is used in this statute in any different sense.

Therefore the United States were not interested in the suit for which the plaintiff claims his fee, nor was it a suit against the officers of the United States or their deputies or duly appointed agents. The section, therefore, does not apply, and the third question should be answered accordingly.

FOURTH QUESTION.

Can the receiver, by employing other counsel and declining to accept the services of the district attorney when tendered by him, deprive him of all compensation?

If it was the official right of the plaintiff to represent the receiver, surely the receiver cannot take advantage of his

own wrong by refusing to allow the plaintiff to exercise that right; the plaintiff would at least be entitled to a retainer in each suit. If the law gives the plaintiff the right to the employment, then it also raises an implied promise on the part of the receiver to employ and pay him. It is the alphabet of law that one impliedly promises to do what the law requires him. An assumpsit is the proper action on such a promise. The examples of this principle are numerous. One impliedly promises to pay a fine imposed upon him however much he may resist its payment, however hurtful it may be to pocket and to pride. One impliedly promises to pay a judgment rendered against him however unjust he may consider the claim on which it is based, however many courts may witness his struggles against its rendition.

Surely the receiver cannot deny the district attorney's rights, ignore him, go to another, and then set up his own violation of law as a defense. In the language of Mr. Justice Field, 4 Saw., 569:

"When other counsel are employed to assist the district attorney it is to aid him in their management, not to assume his authority or direct his conduct."

The fourth question should be answered in the affirmaative.

CONCLUSION.

This case involves a very important question. Upon its decision hinges the dignity and value of the office of district attorney. In these national bank cases and in all important criminal cases the district attorney is compelled to fight single-handed the pick of the bar. The necessity of making the dignity and emoluments of the office such that only competent men will aspire to it and hold it cannot be too strongly stated.

The special attention of the Court is invited to the opinion of the district judge in this case. It leaves but little for a brief to discuss. It will be found in vol. 35, page 721, of the Federal Reporter.

Respectfully submitted.

ROBT. M. HUGHES,
For Plaintiff in Error.

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JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

J. CATLETT GIBSON,
PLAINTIFF IN ERROR,
v.
WM. H. PETERS, RECEIVER,
DEFENDANT IN ERROR.

No. 61.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Brief for Defendant in Error.

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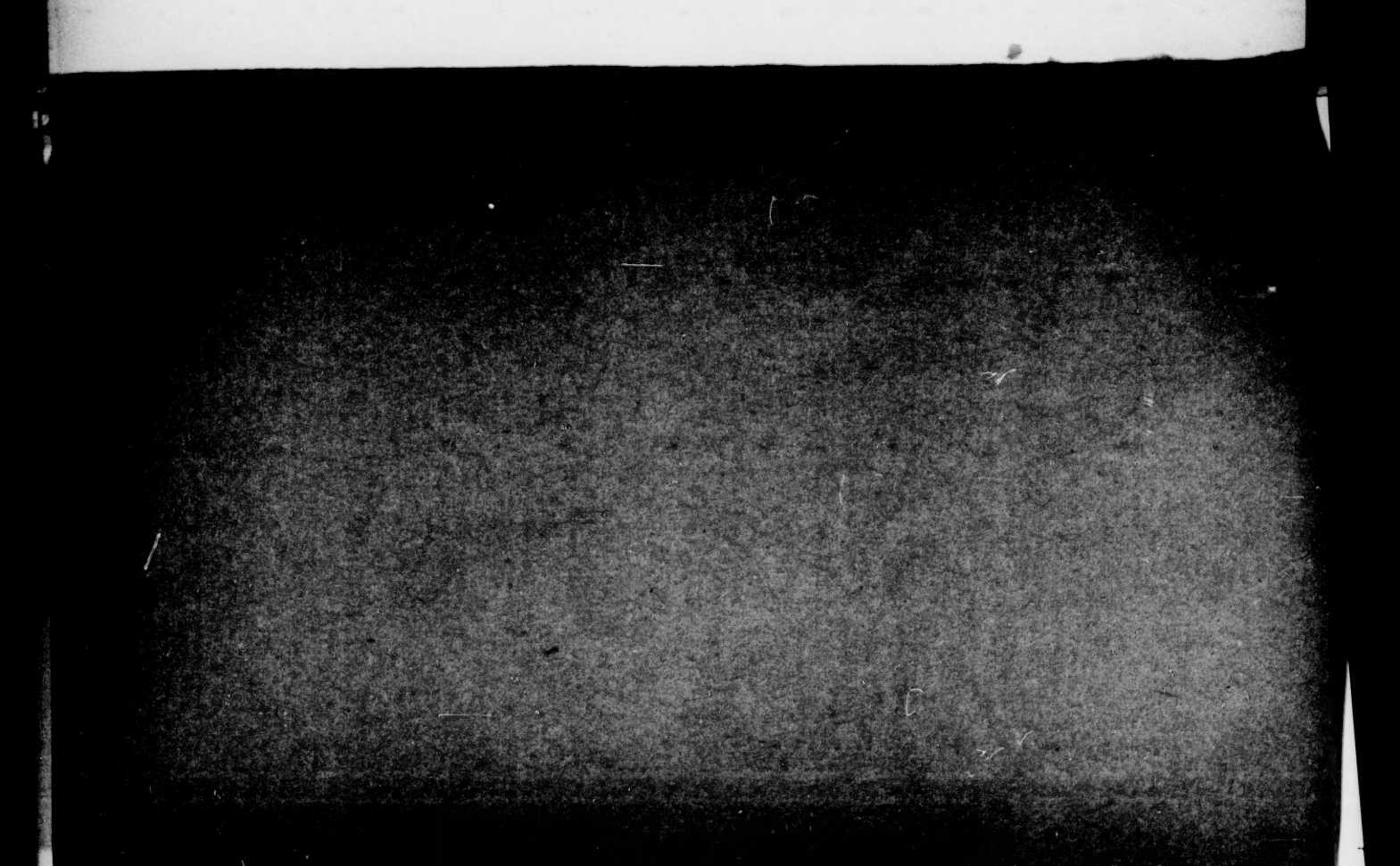

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No. 61.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

Brief for Defendant in Error.

STATEMENT.

This was a suit in the circuit court of the United States, for the eastern district of Virginia, by the plaintiff against the receiver of the Exchange National Bank of Norfolk, to recover a fee for legal services which the plaintiff claims to have rendered as United States attorney for said district, or was entitled to render by virtue of his office, in a certain suit brought by the receiver's special counsel against one R. H. McDonald.

The plaintiff was the U. S. district attorney for the eastern district of Virginia at the time when he claims that he rendered or was entitled to render the services, and he insists that it was his right, as such district attorney, irrespective of any employment by the receiver, or of the receiver's consent thereto, to act as counsel for the receiver.

The receiver instituted the suit against McDonald by his own counsel, under the direction of the Comptroller of the Currency, and of the Solicitor of the Treasury, and claims that he had and exercised the right to do this without requesting the services of the district attorney, who claimed the right to come into the case without the receiver's consent.

The case was argued before Circuit Judge Bond and District Judge Hughes, sitting together and holding the circuit court, but they differed in opinion.

The case is reported as *Gibson* v. *Peters* in 35 Fed. Rep. 721, and 36 Fed. Rep. 487, and it is in this Court upon a certificate of a division of opinion, by the two judges, upon the questions hereinafter set forth. The judges certified that "the plaintiff introduced evidence as to the extent and value of his services rendered, or offered to be rendered, as such U. S. attorney, and the defendant introduced evidence to the contrary thereof, that the plaintiff had not rendered such services, and that the said receiver had not requested any services from the plaintiff in said action, and that other counsel had been employed therein by said receiver, by direction of the Comptroller of the Currency of the United States, and that plaintiff had not presented his claim to the Treasury Department, nor had it been allowed by the Comptroller of the Currency, nor had the plaintiff received any direction from the Solicitor of the Treasury to render such alleged services." (Record, p. 8.)

On this division of opinion, a judgment was rendered for the defendant. (Record, p. 10.)

The plaintiff in error assigns as error the action of the court below in rendering judgment for the defendant in error, and in deciding adversely to the right of the plaintiff in error to recover upon the questions of law involved in the case, and certified by the judges.

ARGUMENT.

I.

First Question.

Whether the United States district attorney is entitled, by virtue of his office, to appear and act as counsel for the receiver of a national bank, in collecting its assets and winding up its affairs, without the request or consent of said receiver, and without the direction of the Solicitor of the Treasury.

We believe that this is the first case in which this question has been fairly presented for consideration, and that this Court is free to decide it upon broad grounds of principle. The plaintiff in error bases his right to recover upon sec. 380, R. S., which is as follows:

"All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury."

This section was originally enacted as sec. 55 of the act of February 25, 1863, known as "The General Bank-

ing Act," which act was modified and enlarged by the act of June 3, 1864, in which latter act it appears as sec. 56. These acts as a whole constitute a general system of banking, and the section under consideration must be interpreted with reference to the statutes constituting the whole system. By these laws new offices were created, new duties were assumed by the Government, and a great system of banking was put under the control of the Treasury Department. The general control of the national banks was given to the Comptroller of the Currency, who was required to perform his duties under the general direction of the Secretary of the Treasury. Sec. 1 of the act of June 3, 1864, is now sec. 324, R. S., and it declares that "there shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds; the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury."

Primarily, the Comptroller of the Currency is charged with the execution of all our currency and banking laws passed by Congress, relating to the issuance and regulation of our national currency. From the time the articles of association are signed by the persons desiring to carry on the business of banking, and filed with the Comptroller of the Currency, until the final dissolution of the association in any of the ways known to the law, its business is under the supervision, direction, or control of the Secretary of the Treasury, the Comptroller of the Currency, and the Treasurer of the United States. (Secs. 5133 to 5243, inclusive.)

When the Comptroller of the Currency becomes satisfied that any banking association has refused to pay its

circulating notes, and is in default, he may forthwith appoint a receiver, who, "under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders." (Sec. 5234, R. S.) All that the Comptroller does in this connection is under the general direction of the Secretary of the Treasury, and all that the receiver does is under the direction of the Comptroller.

Frelinghuysen v. *Baldwin*, 12 Fed. Rep. 395.
Price v. *Abbott*, 17 Fed. Rep. 506.
Bank v. *Kennedy*, 17 Wall. 19.

This section is not to be construed to mean that the receiver shall do no act without special instructions from the Comptroller, for the statutes defining his powers make it his duty to collect the assets and debts of the association, but, in the general sense, he acts under and subject to the direction of the Comptroller, and there are some things which he cannot do without the direction of that officer.

Bank v. *Kennedy*, 17 Wall. 19.
Kennedy v. *Gibson*, 8 Wall. 498, 505.

With the exception of sec. 380, we have not been able to find in the General Banking Act any language conferring powers of any kind upon any other than an officer of the Treasury. So particular was the Congress in this

respect, that, in drafting sec. 380, the Solicitor of the Treasury was the officer designated to direct and supervise the district attorneys. The Solicitor of the Treasury is technically an officer of the Department of Justice (sec. 349), but his duties relate entirely to the business of the Treasury Department. (Secs. 372 to 380, inclusive.) Sec. 380 must be construed in connection with the general plan and provisions of our banking and currency laws, and also with the statutes defining the powers of the Solicitor of the Treasury.

We think we have shown that it was the legislative policy to keep currency and banking matters within the control of the Treasury Department. We think it equally clear that sections 372 to 380, inclusive, require district attorneys, in all business connected with the Treasury Department, to follow the regulations, directions, or instructions of the Solicitor of the Treasury. He takes cognizance of all frauds, or attempted frauds, upon the revenue, and exercises a general supervision over measures for their prevention and detection, and for the prosecution of persons charged with the commission thereof. (Sec. 376.) He establishes regulations, with the approval of the Secretary of the Treasury, for the observance of collectors of customs, and, with the approval of the Attorney-General, for the observance of district attorneys and marshals, respecting suits in which the United States is a party, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States, except as to suits for taxes, forfeitures, or penalties arising under the internal revenue laws. (Sec. 377.) He has the power to instruct the district attorneys, marshals, and clerks of the circuit and district courts, in all matters and proceedings appertaining to suits in which the United

States is a party of interest, except suits for taxes, penalties, or forfeitures under the internal revenue laws, and to cause them, or either of them, to report to him from time to time any information he may require in relation to the same. (Sec. 379.)

So, he not only frames regulations for the observance of district attorneys, but he supervises, directs, and instructs them, and is empowered to cause them "to report to him from time to time any information he may require in relation to the same." The authority just quoted was given to him because of the character of the powers and duties previously cast upon him, and doubtless with reference also to sec. 378, which requires him to report all moneys recovered or collected under his direction to the officer from whom the bond or other evidence of debt was received. For instance, if a district attorney should receive from the Comptroller of the Currency, through the receiver of a bank or otherwise, a "bond or other evidence of debt," and recover or collect money by virtue thereof, the Solicitor of the Treasury would be obliged to make a report thereof to the Comptroller of the Currency, who would give proper credit therefor, and he is, also, required to report, in like manner, all credits allowed, by due course of law, in any suits under his direction.

Sections 372 to 379, inclusive, except 376, were enacted May 29, 1830. Sec. 376 was enacted March 3, 1863. All these sections were in full force at the time sec. 380 was re-enacted in 1864. The language of sec. 380 is in exact harmony with the provisions of the law of May 29, 1830, and of sec. 376, enacted March 3, 1863, which shows that the Congress did not intend to make any departure from the policy of requiring district attorneys to act under the supervision, direction, and instructions of the Solicitor of the Treasury.

It may be instructive to ascertain what construction was put upon the act of May 29, 1830, prior to the enactment of our Banking and Currency Law. In 1837, Attorney-General B. F. Butler advised the Secretary of the Treasury concerning an action on a custom-house bond. He quoted from sections 1, 3, 5, and 7 of the act of May 29, 1830, the same being sections 373, 374, 375, 377, 379, R. S., and held, in a lengthy opinion, that the Solicitor had the power to give instructions either before or after the occurrence of the event to which they applied. (3 Op. 247.)

And Attorney-General Cushing, in an opinion to the President, dated January 1, 1855, predicated upon sections 5, 7 and 10, act of 1830 (sec. 377 and 379, substantially), after quoting the special instructions issued to district attorneys by the Solicitor of the Treasury, held that under these regulations there was no possible room to doubt that, in commencing the suit without instructions, the district attorney violated his duty, and that he had no power to commence a suit of the character described in the law relating to the office of the Solicitor of the Treasury, without instructions so to do from that officer, except in a case of manifest urgency, which it was his duty to communicate to the Solicitor immediately, in order that he might be instructed as to further prosecution. (8 Op. 454.)

By making the directions of the Solicitor govern the district attorneys, the latter officers are kept at the command of the Government, for the protection of its interests, and are not allowed to become so involved with the business of the receiver as to be unable, fairly, honorably and efficiently, to discharge their duties to the United States should the occasion demand.

In view, then, of the language of the whole law defining

the powers and duties of the Solicitor of the Treasury, and of the opinions of the Attorneys-General in relation thereto, we respectfully submit that the district attorney is the subordinate of the Solicitor of the Treasury in an action brought by the United States against a national bank, and that the district attorney cannot lawfully perform any service therein, except the same be done "under the direction and supervision of the Solicitor of the Treasury." It seems to us, that, to hold that the district attorney has the power to render such services, without the direction or instruction of the Solicitor of the Treasury, would be to obliterate by judicial action the plain and positive language of the statute. Our interpretation of the statute would keep "suits and proceedings" of this character under the control of the Treasury Department, whether under the direction of the Comptroller or of the Solicitor of the Treasury, and prevent that discord, irresponsible action, or pernicious inaction, which would surely follow if each district attorney should be allowed to do as he pleased; and it would enforce the rule that special powers given to officers must be exercised with a strict and substantial adherence to all the directions of the statute. (*Sutherland on Statutory Construction*, *sec.* 456.)

The application of this rule to sec. 380 would confine its operation, as we think, to suits and proceedings arising out of the provisions of the law governing national banking associations in which the United States is directly interested, or its officers or agents are parties thereto, as representing its interests. As a general proposition, the Comptroller of the Currency and the receiver of a national bank association represent the bank, its stockholders, and its creditors, and do not represent the Government.

Kennedy v. *Gibson*, 8 Wall. 498–506.

Case v. *Terrell*, 11 Wall. 202.

Price v. *Abbott*, 17 Fed. Rep. 506.

In special instances it may be that the Comptroller and receiver would represent the United States, but they have no power to subject the United States to liabilities of any kind.

Case v. *Terrell*, 11 Wall. 199–203.
Price v. *Abbott*, 17 Fed. Rep. 506.

In the consideration of this question, it must be borne in mind that national banks are private corporations, organized under a general law of Congress by individual stockholders with their own capital, for private gain, and managed by officers, agents, and employés of their own selection. They constitute no part of any branch of the Government of the United States, and while it is true that the Comptroller of the Currency has such supervisory powers over them as are prescribed by the statute, yet this supervision of the banks does not involve the United States in any liability for their acts.

Branch v. *U. S.*, 12 Ct. Cl. 281–286.

Circumstances may require receivers to act in opposition to the interests of the United States, and they, as well as the Comptroller himself, have been made parties defendant in suits brought by the United States to close up the trusts.

Cook County Nat. Bank v. *U. S.*, 107 U. S. 445.
Johnston v. *U. S.*, 17 Ct. Cl. 157.

The Congress contemplated that contingencies would arise, in the settlement of the affairs of national banks, which would render the Comptroller and receiver liable to the inhibitory process of the federal courts. (Sec. 5237 R. S.) And it is provided by sec. 5239 that if the directors of the association shall knowingly violate, or knowingly permit any of its officers, agents, or servants to violate, any of the

provisions of the banking law, a suit should be brought in the federal court by the Comptroller, in his own name, to forfeit the rights, privileges, and franchises of the association, and declare it dissolved. We have not found in the act any provision which would justify the Comptroller or receiver in using the name of the United States in any litigation. Therefore their names must be used in suits brought by or against them. Only in exceptional cases, if at all, can they be said to represent the United States in their official capacity. Surely it cannot be claimed that the receiver in this case represented the United States, in any capacity, in the suit which he brought against McDonald, to recover the amount of an assessment upon him as a stockholder in the bank, which was imposed upon him by the Comptroller of the Currency by virtue of the authority vested in that officer by law. (Record, pp. 1–7.) It is evident that the suit against McDonald was brought by the receiver as the representative of its creditors, and that the suit in no way affected the United States, nor did he, in bringing and maintaining it, represent the Government. As the United States had no interest whatever in the result of the suit brought against McDonald, it certainly was under no obligation to furnish counsel for the receiver, and certainly not without his request or consent. For the same reason it could not have been within the prerogatives of the district attorney to force himself into the case as the representative of a government having no interest therein.

From the foundation of the national banking system until this time, it has been the practice of the Treasury Department that receivers, by and with the approval of the Comptroller, should employ private counsel to represent them in the business and litigation of the trusts, and these private counsel have been paid for their services by the Comptrollers, who annually reported the amount of the legal

expenses so paid to Congress. We think we are safe in saying that nine-tenths of the legal expenses of these trusts represent fees paid to private counsel, for in all cases the district attorney, when employed therein as counsel, acted in a private capacity, and his fees were paid out of the trust funds. These reports have been made to Congress for thirty years, and yet there has been neither inquiry nor legislation designed to condemn or discontinue such employment and payment of private counsel out of the trust funds. This long and unbroken departmental interpretation of the law is certainly entitled to great consideration.

As was said by this Court in *U. S.* v. *Hill*, 120 U. S. 169–180, "this construction of the statute in practice, concurred in by all the Departments of the Government, and continued for so many years, must be regarded as absolutely conclusive in its effect. *Edwards' Lessee* v. *Darby*, 12 Wheat. 206; *U. S.* v. *Temple*, 105 U. S. 97; *Ruggles* v. *Illinois*, 108 U. S. 526; *U. S.* v. *Graham*, 110 U. S. 219." No stronger argument could be offered in favor of our view, that the receiver has the right to employ private counsel, and that the district attorney has not the right to put himself upon the receiver as counsel.

For these reasons, we respectfully submit that the district attorney was not entitled, by virtue of his office, to appear and act as counsel for the receiver, in collecting the assets and winding up the affairs of the bank, without the request or consent of the receiver, the approval of the Comptroller, and without the direction of the Solicitor of the Treasury.

II.

Second Question.

Whether, conceding his right so to appear, and he does so appear of his own motion, he is entitled to any extra compensation beyond that prescribed by law for his official services.

If it be conceded that the district attorney had the right, of his own motion, to appear, and did so appear, as counsel of the receiver in the McDonald case, then it must be conceded, also, that his right so to do rests upon the language of sec. 380, and that, in so appearing as counsel for the receiver, he performed an official act under the laws of the United States. There is no other statute than sec. 380, which can be construed as giving to the district attorney the right to appear as counsel for the receiver. If that statute gives him such right at all, it is because of his official position. Therefore, whatever he may do as such counsel, if he has the legal right to act as such, must be done by virtue of his office. In other words, whatever a district attorney can lawfully do, as the counsel of a receiver, must be done in his official capacity, and such duties as he may thus perform are to be held as additional duties germane to his office. (*U. S.* v. *Hill*, 120 U. S. 179.)

Sec. 823, R. S. U. S., is as follows:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed

to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties."

Counsel for plaintiff in error, on pp. 5 and 6 of their brief, insist that district attorneys are covered by the language "attorneys, solicitors, and proctors," found in sec. 823, and they quote and direct attention particularly to the second sentence of that section, and they assert that the language of that sentence permits their client to claim compensation from the receiver. The command of this section, with reference to "attorneys, solicitors, and proctors," means, in connection with sec. 983, that costs shall be allowed the attorneys of the prevailing party, except where the law otherwise expressly provides; the concluding clause of the first sentence shows that State laws no longer affect the right to costs or the amount which may be allowed. (*United States* v. *Treadwell*, 15 Fed. Rep. 532.) The act of 1793 allowed costs "in favor of parties obtaining judgment." The act of 1853, of which this and the following section are a revision, and which was intended merely to secure a uniform rule of taxation in the Federal courts, did not disclose a design to deprive the party of them and confer them upon his attorney. (*Celluloid Manuf. Co.* v. *Chandler*, 27 Fed. Rep. 9.) The practice which prevailed before the enactment of this statute, of allowing compensation for legal services according to the discretion of the court, is no longer permissible. (*The Nassau*, 1 Blatch. Pr. Cas. 601.) The courts have no discretion but to apply this statute, and without liberality of intendment. (*Stimpson* v. *Brooks*, 3 Blatch. 456.)

This section allows the district attorneys no other compensation than that specifically given them by statute. The concluding sentence of the section allows "attorneys, solicitors, and proctors" to charge to and receive from their clients reasonable compensation in addition to the taxable costs, but it excepts the United States from this rule in order that such "attorneys, solicitors, and proctors" as might be specially employed by the Government in its litigation should not recover both costs and compensation. At any rate, it is expressly enacted that district attorneys shall have no other compensation than that allowed to them by the statute, except in cases otherwise expressly provided by law.

This statute must be construed with secs. 1764 and 1765, which are as follows:

"No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

"No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation thereof explicitly states that it is for such additional pay, extra allowance, or compensation."

The latter section came under review by this Court in *U. S.* v. *King* (147 U. S. 676), in which a clerk of the circuit court of the United States sought to recover fees for services as clerk in selecting juries in connection with

the jury commissioner. The Court applied the statute last cited, discussed a long line of decisions predicated thereon, and adhered to the rule that, where a statute increases the duties of an officer by the addition of other duties germane to his office, he must perform them without extra compensation. The Court held that the services rendered by the clerk were incidental and germane to his regular duties as clerk, and quoted with approval the language of Mr. Justice Miller in *U. S.* v. *Saunders* (120 U. S. 126), in which he said that "the purpose of this legislation was to prevent a person holding an office or appointment, for which the law provides a definite compensation, by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances or pay, for other services which may be required of him, either by act of Congress or by order of the head of his department, or in any other mode added to or connected with the regular duties of the place which he holds."

If the Congress had intended that the district attorney should have additional compensation, it would have been expressly provided for, as in revenue cases, by sec. 825–827, and in prize cases, by sec. 4626.

We submit that these statutes and decisions deny any right upon the part of a district attorney to any compensation, beyond that prescribed by law for his official services.

III.

Third Question.

"*Whether, conceding his right so to appear and act, he is entitled to any extra compensation beyond that provided by law for his official services, except such as the Comptroller of the Currency may allow, after his claim therefor has been presented to the Treasury Department according to the provisions of section* 299, *Revised Statutes.*"

It is provided by sec. 299 that "all accounts of the United States district attorneys for services rendered in cases instituted in the courts of the United States, or of any State, when the United States is interested, but is not a party of record, or in cases instituted against the officers of the United States, or their deputies, or duly appointed agents, for acts committed or omitted, or suffered by them in the lawful discharge of their duties, shall be audited and allowed as in other cases, assimilating the fees, as near as may be, to those provided by law for similar services in cases in which the United States is a party."

This section was considered by Attorney-General Devens, in 16 Op. 99. A district attorney had rendered services in a suit in the State court, and then in the United States court, involving the title of the United States to certain land. He filed an account in the Treasury Department for his services, both in the State court and in the court of the United States. The Attorney-General held that, in general, suits in State courts, although the United States may be directly interested therein, do not fall within the official duty of a district attorney, and that when one appeared in a State court, unless his appearance was pursuant to the previous di-

rection, or had received the subsequent approval, of the Attorney-General, he could not receive compensation from the Government for such services. He then held that the compensation of the district attorney, in a case like the one under his consideration, was regulated by sec. 299, and that it extended to the accounts of district attorneys for services in any case, whether the suit be brought in a State court or in a court of the United States, when the Government is interested in such case, but is not a party of record. In conclusion, he held that, as the district attorney had not made out his account in compliance with sec. 299, it could not be paid by the Treasury Department until it should be restated in accordance with the provisions of that section.

Attorney-General Garland held to the same effect in official letters to the plaintiff in error concerning the fees charged for by him in this case. To us it seems clear that, if the district attorney is entitled to any extra compensation from the United States, it can only be obtained by compliance with the provisions of sec. 299.

IV.

Fourth Question.

"*Whether the United States district attorney, whose official service had been tendered to such receiver and declined by him for the reason that he had employed other counsel, acting under the direction of the Comptroller of the Currency and Solicitor of the Treasury, is entitled to extra compensation for such offer of services, whether the service was rendered by the district attorney or not.*"

All the statutes of the United States regulating the compensation of district attorneys speak of services rendered

and not of services proffered, but refused or not performed. No accounting officer of the United States would allow a district attorney's account for services offered or services which he stood ready to perform. This suit is evidently an attempt to do by indirect means what the district attorney could not do directly. He is trying to reach, while in the hands of the receiver, money which the latter is required, by the last sentence of sec. 5234, to pay over to the Treasurer of the United States, subject to the order of the Comptroller. The fund in the hand of the receiver is a trust fund, which he must pay to the Treasurer of the United States, who can disburse the same only upon the order of the Comptroller. It would have been reversible error had the court below rendered a judgment commanding the receiver to pay the claim of the plaintiff in error out of the trust funds in his possession.

Therefore we submit that the plaintiff in error is not entitled to extra compensation for services offered, but not performed, and to which the receiver objected.

V.

Fifth Question.

"*Whether, conceding his right so to receive extra compensation when he has offered to appear and act as official counsel, without the request or consent of the receiver, is such compensation payable out of the assets of the bank in the hands of the receiver or out of the funds provided by law for the payment of district attorneys for their official services.*"

It is insisted by the plaintiff in error that he is entitled to be paid out of the assets of the bank, because it is pro-

vided by sec. 5238 that "all expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof."

We contend that the participation of the district attorney, if he were the statutory counsel of the receiver, would be an official duty, for which he would receive his compensation from the same source from which he receives his other official compensation, as was held by Attorney-General Garland in his official letters to the plaintiff in error before referred to, but the plaintiff in error contends that his appearance as counsel for the receiver was a right with a private perquisite attached. It would be an anomaly, in the absence of special statutory provision, that any private perquisite should attach to an official station, or to the performance of an official duty, or that such services should be paid for out of private funds, or that Congress would impose the services of an officer of the United States upon a trust being wound up for the sole benefit of individuals, the Government having no pecuniary interest therein.

If the district attorney is entitled to this private perquisite or privilege, he stands in an entirely different position from any other officer of the United States, whose official duties require him to participate in winding up the affairs of defaulting national banks. Nothing of the kind belongs to the Comptroller, or to the Treasurer, or to the Solicitor of the Treasury, or to the Secretary of the Treasury. They each perform their official duties in connection with business of this character, without any extra compensation. Is there any reason why the district attorney should occupy a different position? No argument can be drawn from the fact that the other officers are paid a fixed compensation, for the question is not one of the amount of compensation, nor the adequacy of the pro-

vision made by the Government for the remuneration of its district attorneys. In some special cases, as we have seen, Congress has provided for paying district attorneys out of the funds involved in litigation, but it required special statutes to convey the right to such compensation.

If it be conceded that sec. 380 gave to the district attorney the right to appear in this case in the court below, and if that section was passed for the express purpose of giving him the right to represent the Government, and if it was intended that he should have extra compensation for such services, why was not this legislative intent put in the form of clear and explicit language in that or some other section of the statute? No such statute exists; no such right exists. It is clear that Congress did not intend that the district attorney, even if he were expected to perform services for a receiver, should receive for such services as he might render in connection with the winding up of the affairs of broken national banks, any extra compensation whatever, and certainly not from the fund itself. Upon the contrary, it was evidently the unqualified purpose of Congress that such services as might be rendered by the district attorney in behalf of the Government should be covered by the general law relating to his compensation, for, to use the language of sec. 823, there is nothing "otherwise expressly provided by law." We submit that it is apparent that many district attorneys, by reason of their remoteness from the home of the insolvent bank, or the multiplicity of cares and duties resting upon them, or a peculiar unfitness for the performance of duties incident to advising and representing a receiver, would not be of any assistance to receivers or comptrollers. We do not believe that it would be good public policy to put receivers and Comptrollers into the hands of the district attorneys, and we do not doubt that a similar view